

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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DEREK LOWELL KIRK,

Petitioner,

v.

NEVADA DEPARTMENT OF
CORRECTIONS, et al.,

Respondents.

Case No. 3:16-cv-00079-MMD-VPC

ORDER

On April 18, 2016, this Court dismissed petitioner Derek Lowell Kirk's *pro se* habeas matter as improperly commenced (ECF No. 5), and the case was closed and judgment was entered (ECF No. 6).

The Court received Kirk's completed application to proceed *in forma pauperis*, as well as a motion to amend his petition with the proposed amended petition attached, on April 20, 2016. Because these filings were so close in time to the Court's order dismissing the case and essentially "crossed in the mail," the Court will, in the interests of justice and judicial efficiency, vacate the order dismissing the action and reopen the case.

Kirk's motion for leave to proceed *in forma pauperis* (ECF No. 7) is granted. Kirk's motion for leave to file an amended petition (ECF No. 9) is granted. The Court has reviewed the proposed amended petition pursuant to Habeas Rule 4, and it will be docketed and served on respondents.

A petition for federal habeas corpus should include all claims for relief of which petitioner is aware. If petitioner fails to include such a claim in his petition, he may be

1 forever barred from seeking federal habeas relief upon that claim. See 28 U.S.C.
2 §2254(b) (successive petitions). If petitioner is aware of any claim not included in his
3 petition, he should notify the court of that as soon as possible, perhaps by means of a
4 motion to amend his petition to add the claim.

5 Petitioner has also filed two motions for appointment of counsel (ECF Nos. 8, 12).
6 There is no constitutional right to appointed counsel for a federal habeas corpus
7 proceeding. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Bonin v. Vasquez*, 999
8 F.2d 425, 428 (9th Cir.1993). The decision to appoint counsel is generally discretionary.
9 *Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th Cir.1986), cert. denied, 481 U.S. 1023 (1987);
10 *Bashor v. Risley*, 730 F.2d 1228, 1234 (9th Cir.), cert. denied, 469 U.S. 838 (1984).
11 However, counsel must be appointed if the complexities of the case are such that denial
12 of counsel would amount to a denial of due process, and where the petitioner is a person
13 of such limited education as to be incapable of fairly presenting his claims. See *Chaney*,
14 801 F.2d at 1196; see also *Hawkins v. Bennett*, 423 F.2d 948 (8th Cir.1970). Here, Kirk's
15 amended petition appears sufficiently clear in presenting the issues that he wishes to
16 raise, and the legal issues are not particularly complex. Therefore, counsel is not justified
17 at this time. Kirk's motion is denied.

18 Kirk has also filed a motion to extend the prison copywork limit (ECF No. 13). As
19 indicated, the amended petition will be served on respondents, and respondents are
20 required by Habeas Rule 5 to file the relevant state-court records in support of their
21 response to the petition. Therefore, petitioner's motion for copies will be denied without
22 prejudice to him filing a new motion for copies if respondents do not file necessary
23 documents. However, the Court will grant Kirk's motion for a copy of the amended
24 petition and the docket sheet at this time (ECF No. 11).

25 It is therefore ordered that this Court's order dated April 18, 2016 (ECF No. 5) is
26 vacated as set forth in this order. The Clerk is directed to re-open this action.

27 It is further ordered that petitioner's application to proceed *in forma pauperis* (ECF
28 No. 7) is granted.

1 It is further ordered that petitioner's motion for leave to file amended petition (ECF
2 No. 9) is granted. The Clerk will file and electronically serve the amended petition (ECF
3 No. 9-1) on the respondents.

4 It is further ordered that the Clerk add Adam Paul Laxalt, Nevada Attorney General,
5 as counsel for respondents.

6 It is further ordered that respondents file a response to the petition, including
7 potentially by motion to dismiss, within ninety (90) days of service of the petition, with any
8 requests for relief by petitioner by motion otherwise being subject to the normal briefing
9 schedule under the local rules. Any response filed must comply with the remaining
10 provisions below, which are entered pursuant to Habeas Rule 5.

11 It is further ordered that any procedural defenses raised by respondents in this
12 case must be raised together in a single consolidated motion to dismiss. In other words,
13 the Court does not wish to address any procedural defenses raised herein either *in*
14 *seriatum* fashion in multiple successive motions to dismiss or embedded in the answer.
15 Procedural defenses omitted from such motion to dismiss will be subject to potential
16 waiver. Respondents will not file a response in this case that consolidates their procedural
17 defenses, if any, with their response on the merits, except pursuant to 28 U.S.C. §
18 2254(b)(2) as to any unexhausted claims clearly lacking merit. If respondents do seek
19 dismissal of unexhausted claims under § 2254(b)(2): (a) they must do so within the single
20 motion to dismiss not in the answer; and (b) they must specifically direct their argument
21 to the standard for dismissal under § 2254(b)(2) set forth in *Cassett v. Stewart*, 406 F.3d
22 614, 623-24 (9th Cir. 2005). In short, no procedural defenses, including exhaustion, will
23 be included with the merits in an answer. All procedural defenses, including exhaustion,
24 instead must be raised by motion to dismiss.

25 It is further ordered that, in any answer filed on the merits, respondents must
26 specifically cite to and address the applicable state court written decision and state court
27 record materials, if any, regarding each claim within the response as to that claim.

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1 It is further ordered that petitioner will have forty-five (45) days from service of the
2 answer, motion to dismiss, or other response to file a reply or opposition, with any other
3 requests for relief by respondents by motion otherwise being subject to the normal briefing
4 schedule under the local rules.

5 It is further ordered that any additional state court record exhibits filed herein by
6 either petitioner or respondents must be filed with a separate index of exhibits identifying
7 the exhibits by number. The CM/ECF attachments that are filed further must be identified
8 by the number of the exhibit in the attachment.

9 It is further ordered that the parties must send courtesy copies of all exhibits in this
10 case to the Clerk of Court, 400 S. Virginia St., Reno, NV, 89501, directed to the attention
11 of "Staff Attorney" on the outside of the mailing address label. Additionally, in the future,
12 all parties must provide courtesy copies of any additional exhibits submitted to the Court
13 in this case, in the manner described above.


14 It is further ordered that petitioner's two motions for appointment of counsel (ECF
15 Nos. 8 and 12) are both denied as set forth in this order.

16 It is further ordered that petitioner's motion for copy of petition and docket sheet
17 (ECF No. 11) is granted. The Clerk will send to petitioner one (1) copy of the amended
18 petition, at ECF No. 9-1, and one (1) copy of the docket sheet for this case.

19 It is further ordered that petitioner's motion for extension of copywork limit (ECF
20 No. 13) is denied without prejudice.

21 It is further ordered that petitioner's motion for judicial action (ECF No. 10) is denied
22 as moot.

23 DATED THIS 9th day of December 2016.

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25 
26 MIRANDA M. DU
27 UNITED STATES DISTRICT JUDGE
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